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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1333

LESTER ARTHUR CORSON
and ALFRED SUSKIN,
Petitioners,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Petition for Writ of Certiorari Directed to the Court of Appeal, Second Appellate District, State of California

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

Page

Jurisdiction 2

Opinion Below 2

Constitutional and Statutory Provisions Involved 2

The Facts 3

Questions Presented 6

I. The Fourth Amendment Forbids Unlawful Seizure Without Warning That the Men Conducting the Seizure Are Police Officers. (Massiah v. U.S., 377 U.S. 201, 12 L. Ed. 2d 246; Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694) 8

II. The Defendants Were Entrapped As a Matter of Law 9

III. The Arrest of the Defendants Was the Effect of Trickery, Stealth and Subterfuge, Rendering the Search and Seizure Illegal 10

IV. The Solicitation By the Concealed Government Agent, the Deputy Sheriff, Amounts to Entrapment and the Prosecution Fails and Defendants Are Entitled to the Suppression and Return of the Evidence. (Sorrells v. U.S., 287 U.S. 435, 77 L. Ed. 413; Sherman v. U.S., 356 U.S. 369, 2 L. Ed. 846; Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081) 12

Page

V. The Search and Seizure of Film Is Protected By the First and Fourteenth Amendments to the Constitution of the United States 12

VI. No Miranda Warning 13

TABLE OF CASES AND AUTHORITIES CITED

Cases Page

Fraternal Order of Eagles, No. 778 v. United States, 57 F. 2d 93 ..... 10, 11

Gouled v. United States, 255 U.S. 298, 305, 65 L. Ed. 647, 651 ..... 10, 11

In re Gianimi, 69 Cal. 2d 563 12

Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081 12

Massiah v. U.S., 377 201, 12 L. Ed. 2d 246 8

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694 ..... 8, 13

Olmstead v. U.S., 277 US. 438, 470, 72 L.Ed. 944, 952 10

Osborn v. U.S, 385 U.S. 323, 17 L. Ed. 2d 394 9

People v. Albart, 182 Cal. App. 2d 729, 737 ..... 10, 11

People v. Noroff, 57 Cal. 2d 791 12

People v. Reeves, 61 Cal. 2d 268, 273 ..... 10, 11

People v. Roberts, 47 Cal. 2d 374, 378 ..... 10, 11

People v. Rosakos, 268 Cal. App. 2d 500 12

People v. Treiber, 28 Cal. 2d 659 ..... 4, 11

Ross v. U.S., 354 U.S. 476, 1 L. Ed. 2d 1498 12

Sherman v. U.S., 356 U.S. 369, 2 L. Ed. 2d 848 ..... 10, 12

Sorrells v. U.S., 287 U.S. 435, 77 L. Ed. 413 ..... 9, 12

Authorities

Page

Penal Code of California, Sections 995 and 1538.5..... 6
Penal Code Section 311.2 and Section 311.9..... 3

IN THE

Supreme Court of the United States

October Term, 1972

No.....

LESTER ARTHUR CORSON
and ALFRED SUSKIN,
Petitioners,

vs.

PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Your petitioners respectfully petition for a writ of certiorari directed to the Court of Appeal, Second Appellate District, State of California, to review and reverse an order and judgment denying a petition for writ of mandate and prohibition and/or any other appropriate writ, on the ground that their arrest was illegal and that the search and seizure of their automobile and the seizure of films were in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257, U.S. Codes, and by Rules of this Court.

The petition for writ of mandate and prohibition and/or any other appropriate writ was denied on December 7, 1972.

A petition for hearing was duly filed in the Supreme Court of the State of California and a hearing was denied on January 5, 1973.

This petition is being filed within the time allowed by law.

OPINION BELOW

The minutes of the Court of Appeal, second Appellate District, State of California, for December 7, 1972 are attached hereto, marked Appendix "A" and made a part hereof.

The order of the Supreme Court of California denying a hearing herein, dated January 5, 1973, is attached hereto, marked Appendix "B" and made a part hereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States; Title 47, Section 605, U.S. Codes; Sections 311.2, 311.9, 995 and 1538.5 of the Penal Code of California.

THE FACTS

The defendants were arrested in Malibu, California, without any arrest warrant or without any search warrant.

Without any *Miranda* warning, and without any search warrant or consent of any Magistrate, Deputy Sheriffs seized 500 rolls of film from the back of the automobile in which they were riding, without having looked at the film to actually determine whether there was probable or any cause to seize the film while holding the defendants in custody under arrest.

The defendants were thereafter charged with conspiracy to violate Section 311.2 and Section 311.9 of the Penal Code of the State of California.

The People stipulated that they had no search warrant and no arrest warrant. (R.T. 5, 6, Prel. Hrg.)

On or about August 30, 1971 Paul R. George, a Deputy Sheriff connected with the Sheriff's Vice Squad, was seeking film which he thought could be illegal. He was using a telephone without the consent of the telephone company or any Magistrate. He called a number which was the private residence of Alfred Suskin. He gave a fictitious name as Paul Genarian and continued to have a conversation with a person who identified himself as Al London and to whom the officer gave the fictitious name for himself.

Pretending to be interested in buying some 8 mm color film to take to another State, he made an appoint-

ment on the telephone to meet the defendant in a parking lot at Fairfax and Santa Monica Boulevard. The defendant did not show up at the appointed time and the officer continued to wait for 45 minutes without the defendant having made any appearance.

Again using the telephone without the consent of the telephone company or any Magistrate, the officer called again and asked the defendant on the telephone "What do you have?" He gave no *Miranda* warning again. He said the defendant replied "I have six numbers that show everything."

Other telephone conversations followed without the consent of the telephone company or any Magistrate or any official. (*People v. Treiber,* 28 Cal. 2d 659). In the telephone conversation that followed, the officer negotiated and arranged for a meeting the next day next to the Raft Restaurant in Malibu.

The following day, Suskin was driven to the location by Corson. Suskin got out of the car and met the officer, who then pulled out $4,000 from his pocket and another $200 for the quoted price of the film and packages of playing cards.

Immediately, the Deputy Sheriff who had negotiated the deal and several other deputies seized all of the film in the automobile without looking at or examining it and upon a prearranged signal from the officer who had negotiated the deal and who thereupon took away the money from Suskin that he had given to him.

At the preliminary hearing officer George testified that he did not look at any film or see any pictures in any film prior to the arrest and seizure. His testimony follows:

"A. No, I didn't see the actual film with the pictures on it prior to the arrest. No, I did not.

"Q. And you and your associates seized the film and took it in your possession without having actually seen a single film; is that not right?

"A. That's correct.

"Q. At the time you and your associate officers seized the film, neither you nor any of your associate officers actually knew there were 500 or any 8 millimeter color films in white boxes, of your own knowledge?

"A. It was represented to me at the time of the sale.

* * *

"Q. I mean that you did not know the contents of those boxes until after the arrest. That is a simple question.

"You did not know the exact nature of the contents of those boxes by having looked at them and seeing them, as you are trying to show the Court today that there was film or color film, 8 millimeter color film. Is that right?

"A. If what you mean is that I examined the contents of the boxes prior to the arrest, no. (R.T. 42-43 Prel. Hrg.).

The Magistrate overruled any objections to the

arrest or the seizure made without probable cause, and overruled the contention of the defendants that they had been entrapped in violation of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Magistrate held the defendants to answer as did the trial court, overruling the objection that the search and seizure were unlawful and that the defendants had been entrapped, that there had been no consent as required by the law of the State of California for the use of the telephone from the telephone company, and no consent for the search and seizure from any Magistrate.

Pursing their rights under Sections 995 and 1538.5 of the Penal Code of California, the Court of Appeals, Second Appellate District denied an application for a write of Mandate and prohibition and any other appropriate writ, without opinion. The Supreme Court of California, within the time allowed by law, denied a petition for hearing, without opinion. This petition for writ of certiorari follows.

QUESTIONS PRESENTED

1. Whether seizure of film in an automobile, without a search warrant and without any description of the things to be seized, and without the officers having seen the contents of the property they were taking before they seized it, violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether film that is seized without an examination and determination of its contents as a free expression of ideas violates the First Amendment to the Constitution of the United States.

3. Whether the seizure of film prior to its determination by a hearing that its dominant theme is such as appeals to a prurient interest in sex or that the material is patently offensive because it affronts contemporary community standards relating to sexual matters, or that the material is utterly without redeeming social values, violates the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether the use of the telephone by an officer using a phony name and trying to get the defendant to meet him after he was unsuccessful was entrapment as a matter of law and violated the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Whether an entry by telephone into the home obtained by trickery, stealth or subterfuge renders a search and seizure thereafter invalid.

REASONS FOR GRANTING THE WRIT

I

THE FOURTH AMENDMENT FORBIDS UNLAWFUL SEIZURE WITHOUT WARNING THAT THE MEN CONDUCTING THE SEIZURE ARE POLICE OFFICERS. (*MASSIAH v. U.S.*, 377 U.S. 201, 12 L.ED. 2d 246; *MIRANDA v. ARIZONA*, 384 U.S. 436, 16 L.ED.2d 694)

The Fourth Amendment forbids the seizure of property without a search warrant and without probable cause, describing the things to be seized. There was no description of the things to be seized. The officers had not seen the contents of the property they were taking.

There was no evidence in the possession of the officers that the material was obscene, or that the material was not protected by the First Amendment. There was no information in the possession of the officers that (a) the dominant theme of the material taken as a whole appealed to a prurient interest in sex; (b) that the material is patently offensive because it affronts contemporary community standards relating to sexual matters; and (c) that the material is utterly without redeeming social values.

There was therefore no evidence in the possession of the officers on which they could lawfully seize the boxes, unidentified and not seen, by acting arbitrarily and capriciously and then looking to see at a later

time and away from the location, what they contained.

For all the officers could determine, these could be tapes of a Bible course. The boxes might be too small for Gideon Bibles. But all they knew was hearsay and did not warrant a search and seizure.

II

THE DEFENDANTS WERE ENTRAPPED AS A MATTER OF LAW.

The officer, using a phony name, tried to get Mr. Suskin to meet him and was unsuccessful. He tried again by telephone, without any authority, for another time and place, and pretended he wanted to buy the film to take out of the States. This time he succeeded in setting up a meeting which led to the arrest of the defendants.

There is no evidence in the record anywhere that but for the telephone calls and persuasion of the officer that he would be able to set up a trap which would ensnare Suskin. Conduct such as this has been held to be entrapment as a matter of law. There was no evidence that Suskin showed any predisposition to commit the offense charged and the officers were successful in persuading him to meet the officer and be solicited into obtaining what later proved to be film.

As said in *Osborn v. U.S.*, 385 U.S. 323, 17 L. Ed. 2d 394: "Of course, when solicitation by the concealed government agent goes so far as to amount to entrapment, the prosecution fails. *Sorrells v. U.S.*, 287 U.S.

435, 77 L. Ed. 413; *Sherman v. U.S.*, 356 U.S. 369, 2 L. Ed. 2d 848 But the 'dirty business' (*Olmstead v U.S.*, 277 U.S. 438, 470, 72 L. Ed. 944, 952 (Mr. Justice Holmes dissenting)) does not begin or end with entrapment. Entrapment is merely a facet of a much broader problem. Together with illegal searches and seizures, coerced confessions, wiretapping, and bugging, it represents lawless invasion of privacy. It is indicative of a philosophy that the ends justify the means."

III

THE ARREST OF THE DEFENDANTS WAS THE EFFECT OF TRICKERY, STEALTH AND SUBTERFUGE, RENDERING THE SEARCH AND SEIZURE ILLEGAL.

In *People v. Reeves*, 61 Cal. 2d 268, 273, the court said:

> "It is well settled by both federal and state decisions that 'an entry obtained by trickery, stealth or subterfuge renders a search and seizure invalid.' (*People v. Roberts*, 47 Cal. 2d 374, 378; to the same effect see *People v. Albert*, 182 Cal. App. 2d 729, 737; *Gouled v. United States*, 255 U.S. 298, 385, 65 L. Ed. 647, 651; *Fraternal Order of Eagles, No. 778 v. United States*, 67 F. 2d 93).
>
> "But, although the officers had no legal right to rely on facts gained by ruse of subterfuge in determining whether they had reasonable and probable cause to enter, search and arrest, it still remains to be determined, when the officers ar-

rived at the King George Hotel and found that Reeves was there registered, did they, at that moment, know sufficient facts so as to have had reasonable and probable cause to enter the room without a warrant?"

In *People v. Treiber,* 28 Cal. 2d 659, the Supreme Court of California held that the subscriber of the telephone cannot, without the approval of the telephone company, authorize a connection to a telephone wire. A subscriber is also liable to punishment if he permits another to make a connection and use the telephone without the authority of the operator of the system. No permission was obtained by the Sheriff's Deputy either from the telephone company or by an authorized Magistrate to conduct a search of the defendants by lawless invasion of privacy. Without doubt, the officer seeking to buy film was an active participant as an instigator in the alleged crime—an agent provocateur.

See also: *People v. Roberts,* 47 Cal. 2d 374, 378; *People v. Albert,* 182 Cal. App. 2d 729, 737; *Gouled v. U. S.,* 255 U.S. 298, 305, 65 L. Ed. 647, 651; *Fraternal Order of Eagles, No. 778 v. U.S.,* 57 F. 2d 93; *People v. Reeves,* 61 Cal. 2d 268, 273.

IV

THE SOLICITATION BY THE CONCEALED GOVERNMENT AGENT, THE DEPUTY SHERIFF, AMOUNTS TO ENTRAPMENT AND THE PROSECUTION FAILS AND DEFENDANTS ARE ENTITLED TO THE SUPPRESSION AND RETURN OF THE EVIDENCE. (*SORRELLS v. U.S.*, 287 U.S. 435, 77 L.ed. 413; *SHERMAN v. U.S.*, 356 U.S. 369, 2 L.ed.2d 848; *MAPP v. OHIO*, 367 U.S. 643, 6 L.ed.2d 1081)

V

THE SEARCH AND SEIZURE OF FILM IS PROTECTED BY THE FIRST AND FOURTEENTH AEMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Unless the facts sustain all three elements of obscenity, namely, appeal to prurient interest, excess over accepted standards, and lack of redeeming social importance, where the material is so found to lack one of the elements of obscenity, the courts cannot supply this element. (*Ross v. U.S.*, 354 U.S. 476, 1 L. Ed. 2d 1498; *People v. Noroff*, 67 Cal. 2d 791, and cases cited on page 796; *People v. Rosakos*, 268 Cal. App. 2d 500; *In re Gianimi*, 69 Cal. 2d 563).

VI

NO *MIRANDA* WARNING

In carrying on their attempted deal, the defendants were not given the *Miranda* warning by the officers (*Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694). All of the interrogation by the officer from the start of his telephoning constituted a search for film that the officer deemed obscene. It was an illegal search under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the result of that illegal search should be suppressed and the evidence returned.

WHEREFORE, petitioners pray that this Honorable Court grant a writ of certiorari for the reasons above stated and order the case dismissed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners

EXHIBIT "A"

MINUTES FOR DECEMBER 7, 1972

DIVISION ONE:

2nd Civil 41257 Corson, et al *vs.* Superior Court, Los Angeles

THE COURT:

PETITION FOR WRIT OF PROHIBITION/MANDATE DENIED

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, does hereby certify that the preceding is a true and correct copy of the minute order of this Court, as shown by the records of my office.

Witness my hand and the seal of this Court this 15th day of February, A.D., 1973.

CLAY ROBINS, JR., Clerk
By G. Williams,
Deputy Clerk

EXHIBIT "B"

ORDER DUE
January 5, 1973

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 1, Civil No. 41257

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CORSON ET AL.

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY

Petition for hearing DENIED.

FILED
JAN 3 1973
G. E. BISHEL Clerk
BY _____ Deputy

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 15th day of February A.D. 1973

Clerk
By _____ Deputy Clerk

WRIGHT, C. J.
Chief Justice

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1972
No. 72-1333

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LESTER ARTHUR CORSON
and ALFRED SUSKIN,

Petitioners,

v.

SUPERIOR COURT OF THE COUNTY
OF LOS ANGELES,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION

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TOPICAL INDEX

	Page
Brief of Real Party in Interest in Opposition	1-5
Statement of the Case	1-2
THIS COURT LACKS JURISDICTION TO HEAR THIS MATTER	3-5
Conclusion	5
Appendix	i

TABLE OF AUTHORITIES CITED

Cases	Page
Boyle v. Landry, 401 U.S. 77, 27 L.Ed.2d 696, 91 S.Ct. 758	5
Byrne v. Karalexis, 401 U.S. 216, 27 L.Ed.2d 792, 91 S.Ct. 777	5
California v. Stewart, 383 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602	4
Chapman v. California, 405 U.S. 1020, 33 L.Ed.2d 483, 92 S.Ct. 1284	4
Dyson v. Stein, 401 U.S. 200, 27 L.Ed.2d 781, 91 S.Ct. 769	5
People v. Medina, 6 Cal.3d 484, 492 P.2d 686	3
Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674	5
Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764	4
Whitus v. Georgia, 385 U.S. 545, 17 L.Ed.2d 599, 87 S.Ct. 643	4
Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 699, 91 S.Ct. 746	4
Rules	
Rules of the Supreme Court of the United States, Rule 19	4
Statutes	
California Penal Code, Sec. 995	1,3
Sec. 999	2
Sec. 1538.5	2,3
United States Code, Title 28, Sec. 1257(3)	3,4

IN THE

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LESTER ARTHUR CORSON
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v.

SUPERIOR COURT OF THE COUNTY
OF LOS ANGELES,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION

STATEMENT OF THE CASE

There is now pending in the Superior Court of the State of California for the County of Los Angeles a criminal prosecution, case number A-064,383, in which petitioners are charged with conspiracies relating to obscenity. (See Petition, p. 3.) On February 15, 1972, the pretrial motion of each petitioner to set aside the information pursuant to California Penal Code section 995 was denied

by the trial court.[1] On October 17, 1972, the pretrial motion of each petitioner made under California Penal Code section 1538.5 was denied by the trial court.[2] A petition for writ of mandate and prohibition and/or other appropriate writ was denied without opinion on December 7, 1972 by the Court of Appeal of the State of California, Second Appellate District. (See Petition, p. 2 and Exhibit "A" thereto.) A petition for hearing was denied without opinion by the California Supreme Court on January 5, 1973. (See Petition, p. 2 and Exhibit "B" thereto.) On April 2, 1973, a petition for writ of certiorari was filed in this Court ". . . to review and reverse an order and judgment denying a petition for writ of mandate and prohibition and/or any other appropriate writ, on the ground that their arrest was illegal and that the search and seizure of their automobile and the seizure of films were in violation of the Fourth and Fifth Amendments to the Constitution of the United States." (See Petition p. 1.) This Court has directed that a response be filed in this case on or before June 20, 1973.[3]

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1. California Penal Code sections 995 and 999a are set forth in the Appendix.

2. California Penal Code section 1538.5 is set forth in the appendix.

3. Although the Clerk of this Court requested the Attorney General of the State of California to file a response, it is the District Attorney of the County of Los Angeles who is the attorney of record for the real party in interest. For that reason, the latter will file this response.

THIS COURT LACKS JURISDICTION
TO HEAR THIS MATTER

Both California Penal Code sections 995 and 1538.5 pertain to pretrial proceedings in a criminal case. Neither the denial without opinion of a petition for a writ of prohibition/mandate by the Court of Appeal of the State of California, Second Appellate District, nor the denial without opinion of a hearing by the California Supreme Court constituted a conclusive decision on the merits. Indeed, "It is settled law than an appellate court's action denying without opinion a petition for a writ of mandate or prohibition is not the determination of a 'cause' requiring oral argument and a written opinion." (People v. Medina, 6 Cal.3d 484, 490, 492 P.2d 686, 689.) Furthermore, "The denial without opinion of a petition for a writ of mandate or prohibition is not res judicata except when the sole possible ground of denial was on the merits or it affirmatively appears that the denial was intended to be on the merits." (Id., 6 Cal.3d at 491 (footnote 6); 492 P.2d at 690.)

Manifestly, Petitioners have erroneously invoked the jurisdiction of this Court under 28 U.S.C. Section 1257(3) because there has been no "[f]inal judgment or decree rendered by the highest court of a State in which a

decision could be had, . . ." (See Whitus v. Georgia, 385 U.S. 545, 546-547, 17 L.Ed.2d 599, 602, 87 S.Ct. 643; Chapman v. California, 405 U.S. 1020, 33 L.Ed.2d 483, 92 S.Ct. 1284.)[4]

Finally, even if it should be deemed that the denial of the petition for writ of prohibition mandate by the Court of Appeal of the State of California, Second Appellate District, constituted a final judgment or decree within the meaning of 28 U.S.C. Section 1257(3), we respectfully urge that the instant case, which involves a pending criminal prosecution set for trial, is not appropriate for a present review on writ of certiorari, Rule 19, Rules of the Supreme Court of the United States. See Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 699, 91 S.Ct. 746; Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.

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4. Because this Court in Chapman denied the petition for a writ of certiorari, "[i]t appearing that the state court decision is not final," although a written opinion was rendered by a California appellate court respecting pretrial litigation of search and seizure issues in an obscenity case, there is all the more reason to conclude that the petition for a writ of certiorari should be denied in the instant case where the appellate courts did not render written opinions. It should be noted that Chapman, as does the instant case, does not involve a situation where denial of review would effectively foreclose this Court's later consideration of a federal claim. (Compare, California v. Stewart, 383 U.S. 436, 498 (footnote 71), 16 L.Ed.2d 694, 86 S.Ct. 1602.)

2d 688, 91 S.Ct. 764; Boyle v. Landry, 401 U.A. 77, 27 L.Ed.2d 696, 91 S.Ct. 758; Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674; Dyson v. Stein, 401 U.S. 200, 27 L.Ed.2d 781, 91 S.Ct. 769; Byrne v. Karalexis, 401 U.S. 216, 27 L.Ed.2d 792, 91 S.Ct. 777.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOSEPH P. BUSCH
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Acting Head
Appellate Division

ARNOLD T. GUMINSKI
Deputy District Attorney

Attorneys for Real Party
in Interest.

§ 995. Cases in which indictment or information must be set aside

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases;

If it be an indictment:

1. Where it is not found, endorsed and resented as prescribed inthis code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been commited without reasonable or probable cause.

(Enacted 1872. Amended by Code Am.1880, c. 118, p. 43, § 1; Stats. 1911, c. 256, p. 435, § 1; Stats. 1927, c. 854, p. 1756, § 1; Stats.1939, c. 457, p. 1806, § 1; Stats. 1949, c. 1311, p. 2298, § 1.)

§ 999a. Writ of prohibition; time for filing petition; grounds; service; time for issuance of alternative writ

A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, must be filed in the appellate court within 15 days after a motion made under Section 995 of this code to set aside the indictment on the ground that the defendant has been indicted without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court. A copy of such petition shall be served upon the district attorney of the county in which the indictment is returned or

the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment.

(Added by Stats.1949, c. 1311, p. 2299, § 2. Amended by Stats.1953, c. 614, p. 1861, § 1.)

§ 1538.5 Motion to return property or suppress evidence

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) First hearing. When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Evidence. Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) Effect of granting motion. If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the People.

(e) Return of property. If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) Felony; motion at preliminary hearing. If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) Misdemeanor; pre-trial motion at special hearing. If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) Motion at trial. If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) Felony; renewal of motion at special hearing review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) Relitigation of question after grant of motion; new evidence, review. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the

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the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is grante at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) Release of defendant pending resumption of proceedings in trial court. If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a

petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged fron actual custody upon bail.

(l) Stay; time for trial; dismissal; continuance; bail or release. If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4

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(m) Exclusive pre-trial remedy; review on appea after conviction. The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedie prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds;existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) People's petition for mandate or prohibitio notice of intention. Within 30 days after a defendants motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for

a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

(Added by Stats.1967, c. 1537, p.3652, § 1. Amended by Stats.1970, c. 1289, p. 2380, § 2; Stats,1970, c. 1441, p. 2800, § 1.5.)